No. 93-714

In the Supreme Court of the United States

OCTOBER TERM, 1993

U.S. BANCORP MORTGAGE COMPANY, PETITIONER

v.

BONNER MALL PARTNERSHIP

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the rule of vacatur announced in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), should apply to cases that become moot in this Court because of voluntary settlement by the parties after the Court has granted a petition for a writ of certiorari.

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INTEREST OF THE UNITED STATES

The federal government "is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity." *United States* v. *Mendoza*, 464 U.S. 154, 159 (1984). As a party to numerous cases in the federal judicial system that involve recurring issues of public importance (*id.* at 159-163), the federal government is vitally interested in the question of whether vacatur is appropriate when parties settle cases on appeal.

STATEMENT[1]

1. In 1984 and 1985, an entity named Northtown Investments built the Bonner Mall in Bonner County, Idaho. Northtown financed construction of the mall with a loan from First National Bank of North Idaho; petitioner now holds that loan. In October of 1986, Northtown sold the mall to respondent, subject to the mortgage that secures repayment of the loan held by petitioner. When respondent failed to comply with its obligations under the mortgage, petitioner exercised its right to schedule the property for a foreclosure sale. See Pet. App. A4-A5, A91-A92.

2. On the day before the sale, respondent filed a petition in the United States Bankruptcy Court for the District of Idaho, seeking relief under Chapter 11 of the Bankruptcy Code. Petitioner sought relief from the automatic stay imposed by 11 U.S.C. 362(a) so that it could proceed with its foreclosure. The bankruptcy court eventually granted relief, based on its conclusion that there was not a reasonable possibility of a successful reorganization within a reasonable time. That conclusion rested on the court's legal determination that Chapter 11 of the Bankruptcy Code does not permit approval of a plan under which the owners of the failed enterprise retain an ownership interest in the reorganized business over the objection of unpaid creditors, even if the ownership share rests on "new value" contributed by the owners. J.A. 29-33; see Pet. App. A5-A8, A92-A97.

3. The district court reversed. Pet. App. A90-A117. It concluded that Chapter 11 of the Bankruptcy Code permits owners to participate in reorganizations if they contribute new

[1] A more detailed statement of the facts and procedural history of the case appears in the amicus brief on the merits that the United States filed in support of petitioner in February 1994. For convenience, this brief refers to that earlier brief as "U.S. Br."

value, even if the creditors object (a rule generally referred to as the new-value exception to the absolute priority rule[2]). Pet. App. A98-A116.

4. The court of appeals affirmed. That court agreed with the district court's conclusion that Chapter 11 of the Bankruptcy Code includes the new-value exception. Pet. App. A1-A84.

5. On January 10, 1994, this Court granted a petition for a writ of certiorari to review the propriety of the court of appeals' acceptance of the new-value exception. 114 S. Ct. 681.

6. On March 2, 1994, petitioner and respondent stipulated to the confirmation of a consensual plan of reorganization.[3] On March 10, 1994, the bankruptcy court entered an order confirming that plan. Because petitioner consented to the plan, it was confirmed by the bankruptcy court under 11 U.S.C. 1129(a). Accordingly, the court had no occasion to consider the propriety of a new-value exception, which is at issue only in cases in which the court is asked to confirm a plan over the objection of creditors, under 11 U.S.C. 1129(b). The agreement of the parties did not address the question whether the judgment of the court of appeals should be vacated. See Memorandum of Respondent Suggesting that the Case Is Moot at 2-3 & Exhs. A, B [hereinafter Resp. Mem.].

[2] The absolute priority rule is the rule set forth in 11 U.S.C. 1129(b)(2)(B)(ii) & (C)(ii), which generally gives creditors absolute priority over equity holders in the assets of a bankruptcy estate. See U.S. Br. 12 & n.16.

[3] That settlement occurred pursuant to a January 7, 1994, agreement of the parties that was subject to certain conditions to be performed by respondent and its partners. See Memorandum of Respondent Suggesting that the Case Is Moot at 2. Neither the papers filed at the petition stage nor petitioner's brief informed the Court of that agreement. The United States was not aware of the agreement until after it had filed its brief in support of petitioner.

7. Respondent filed a memorandum in this Court suggesting that the case is moot and moving the Court for dismissal of the petition under Rule 46 of the Rules of this Court. Resp. Mem. 3. Petitioner responded, agreeing that the case is moot, but asking the Court to vacate the judgment of the court of appeals in accordance with *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Response of Petitioner to Memorandum of Respondent Suggesting that the Case Is Moot. The parties filed another round of pleadings reiterating their views. See Respondent's Reply to Response of Petitioner [hereinafter Resp. Reply]; Petitioner's Reply in Support of Request To Vacate Decision Below. On March 28, 1994, the Court removed the case from the calendar for the April 1994 argument session and asked for briefing and oral argument on the question whether *Munsingwear* makes it appropriate for the Court to vacate the decision of the court of appeals.

SUMMARY OF ARGUMENT

I. Under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), federal courts generally are required to grant a motion to vacate the judgment below when a case becomes moot while the process of appellate review is ongoing. That practice should apply whether the case becomes moot because of "happenstance"—*i.e.*, for reasons external to the case—or because of settlement.

A. This Court consistently has followed the *Munsingwear* procedure in cases that have become moot by reason of the parties' settlement while the case is pending in this Court. To be sure, *Munsingwear* itself involved mootness that arose from "happenstance" rather than agreement of the parties, but *Munsingwear* announces a categorical rule of vacatur upon mootness, and this Court's cases have not limited *Munsingwear* to cases of mootness by happenstance. Rather, vacatur is appropriate whenever a case in which appellate review is ongoing becomes moot as a result of external events, the

mutual agreement of the parties, or the unilateral conduct of the party that prevailed below. In either of the latter two situations, the decision of the party that prevailed in the lower court to forgo reliance on the lower court's judgment as a proper resolution of the underlying dispute justifies vacatur of the judgment, which has become unreviewable as a result of the action of the prevailing party.

B. The Court's established practice of vacating a lower-court judgment when a pending case becomes moot as a result of the parties' settlement is consistent with considerations of fairness and public policy. The law strongly favors voluntary settlement of disputes because it fosters judicial economy, economic efficiency, and the public and private interests in the just resolution of disputes. A general rule of vacatur upon settlement furthers those interests by removing disincentives to settlement in cases that are pending on appeal. Absent vacatur, settlement will be impossible to achieve in cases in which the losing party regards the preclusive or precedential effects of the judgment below as unacceptable. That concern is particularly strong in cases involving the government and other institutional litigants, for whom the preclusive and precedential effects of an adverse judgment may be more significant than its more immediate impact or the cost of settlement.

Although some courts have identified a number of countervailing considerations, particularly the public's interest in the judicial system and its decisions, those considerations do not outweigh the interests furthered by a rule of vacatur. In most cases, it is speculative to conclude that preservation of the precedent would foster judicial economy by significantly limiting the need for future litigation of the issues. Because settlement in each case offers an immediate and certain benefit by ending the controversy before the court—the only controversy adequate to justify an exercise of the court's Article

III powers—the interest in a rule encouraging settlement should prevail.

Nor should the rule be limited to cases in which both parties seek vacatur of the lower court's decision. A rule limiting vacatur to such cases would prevent settlements where the parties can resolve their existing dispute, solely because of the inability of the parties to agree on how to resolve hypothetical future disputes. The interest in encouraging settlement, coupled with the attenuated significance to an Article III court of future hypothetical disputes, counsels in favor of applying the rule of vacatur in such cases.

II. If the Court rejects a general rule of vacatur in favor of an ad hoc approach, we submit that a proper balancing of the relevant interests would lead to the conclusion that vacatur is appropriate in this case. This is not a situation in which the party that lost below has rendered the case moot by relinquishing its efforts to overturn the lower court's decision. Rather, the settlement agreed to by the parties reflects respondent's unwillingness to insist on the rights accruing to it under the judgment of the lower court. Furthermore, vacatur of that judgment would alleviate the conflict in the circuits that created the need for review by this Court. Accordingly, the interests of the public would not be served by leaving in place the precedential effects of the decision of the court of appeals.

ARGUMENT

I. THIS COURT SHOULD VACATE THE JUDGMENT OF A COURT OF APPEALS IF THE CASE BECOMES MOOT AS A RESULT OF SETTLEMENT WHILE THE CASE IS PENDING IN THIS COURT ON WRIT OF CERTIORARI

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Society* v. *Heck-*

ler, 464 U.S. 67, 70 (1983) (per curiam); see *Church of Scientology* v. *United States*, 113 S. Ct. 447, 449 (1992); *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988). A corollary to that basic principle is that the parties' dispute must exist at every stage of the litigation. "It is not enough that a controversy existed at the time the complaint was filed." *Deakins*, 484 U.S. at 199; *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975); *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974); see also *Honig* v. *Doe*, 484 U.S. 305, 329 (1988) (Rehnquist, C.J., concurring). "[A]n actual controversy must exist at all stages of appellate review." *Honig*, 484 U.S. at 329 (Rehnquist, C. J., concurring); see *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990).

In accordance with the foregoing principles, this Court repeatedly has held that a settlement agreement that fully resolves the dispute between the parties renders the case moot and thereby deprives the Court of jurisdiction to decide the case on the merits.[4] If the settlement occurs while appellate review is ongoing, however, a further question arises: What effect should the settlement-induced mootness have on the judgment already entered by the lower court?[5] In

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[4] See *Lake Coal Co.* v. *Roberts & Schaefer Co.*, 474 U.S. 120, 120 (1985) (per curiam); *Hammond Clock Co.* v. *Schiff*, 293 U.S. 529, 530 (1934) (per curiam); *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920) ("Where by an act of the parties * * * the existing controversy has come to an end, the case becomes moot and should be treated accordingly."); *Buck's Stove & Range Co.* v. *American Federation of Labor*, 219 U.S. 581, 581 (1911) (per curiam); *Mills* v. *Green*, 159 U.S. 651, 654 (1895); see also *Honig*, 484 U.S. at 341 (Scalia, J., dissenting) (discussing constitutional underpinnings of that rule).

[5] The courts of appeals faced with cases that become moot by settlement while pending before them have resolved that question in different ways. The Second and Federal Circuits have adopted a general rule in favor of vacating a judgment under review when a case is settled on appeal. See, *e.g.*, *Nestle Co.* v. *Chester's Market, Inc.*, 756 F.2d 280, 283-284 (2d Cir. 1985); *Federal Data Corp.* v. *SMS Data Products Group, Inc.*, 819 F.2d 277, 279-280 (Fed. Cir. 1987). But cf. *Manufacturers Hanover Trust Co.* v.

our view, both this Court's precedents and considerations of fairness and public policy support a general rule of vacatur of lower-court judgments when settlement renders a case moot while appellate review of the case is ongoing.[6]

Yanakas, 11 F.3d 381, 384-385 (2d Cir. 1993) (different rule if case settles after issuance of judgment by court of appeals) (discussed at note 6, *infra*). Similarly, the Fourth, Eighth, Tenth, and Eleventh Circuits appear to grant vacatur when settlement renders a case moot while on appeal, although those courts have not addressed the question at length. See, *e.g.*, *Kennedy* v. *Block*, 784 F.2d 1220, 1225 (4th Cir. 1986); *Hendrickson* v. *Secretary of Health & Human Services*, 774 F.2d 1355, 1355 (8th Cir. 1985) (vacating own judgment); *Studio 1712, Inc.* v. *Etna Products Co.*, 968 F.2d 10 (10th Cir. 1992); *Baxter Healthcare Corp.* v. *Healthdyne, Inc.*, 956 F.2d 226, 227 (11th Cir. 1992) (vacating own judgment). But cf. *Oklahoma Radio Associates* v. *FDIC*, 3 F.3d 1436, 1444-1445 (10th Cir. 1993) (different rule if case settles after issuance of judgment by court of appeals) (discussed at note 6, *infra*). The Third, Seventh, and District of Columbia Circuits, on the other hand, uniformly decline to grant vacatur upon settlement. See, *e.g.*, *Clarendon Ltd.* v. *Nu-West Industries, Inc.*, 936 F.2d 127, 128-130 (3d Cir. 1991); *In re Memorial Hospital, Inc.*, 862 F.2d 1299, 1301-1303 (7th Cir. 1988); *In re United States*, 927 F.2d 626, 627-628 (D.C. Cir. 1991). Finally, the Ninth Circuit employs a balancing approach, under which the propriety of vacatur depends upon the relative weight of the public and private interests at stake in a particular case. *National Union Fire Insurance Co.* v. *Seafirst Corp.*, 891 F.2d 762, 765-769 (9th Cir. 1989); *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720, 721-722 (9th Cir. 1982).

The Court granted certiorari to resolve that issue in *Kaisha* v. *U.S. Philips Corp.*, 113 S. Ct. 1249 (1993), but the Court dismissed the writ without reaching the vacatur issue because the petitioner, which was objecting to vacatur, was not a party to the case. 114 S. Ct. 425 (1993) (per curiam). The United States supported a general rule of vacatur upon settlement in its amicus brief in *Kaisha*.

[6] In this brief we refer to the process of appellate review as ongoing in this Court only after the Court has granted plenary review. We consistently have argued that different considerations should apply when a case becomes moot while a petition for certiorari is pending before this Court but has not yet been granted, because the decision whether to grant review on any issue (including mootness) is discretionary with the Court. See, *e.g.*,

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U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900) (arguing that Court should deny certiorari in moot cases that would not have warranted review on the merits); see *Clarke* v. *United States*, 915 F.2d 699, 713-715 (D.C. Cir. 1990) (en banc) (Edwards, J., dissenting); Robert L. Stern et al., *Supreme Court Practice* § 18.5, at 724 n.29 (7th ed. 1993) (discussing *Velsicol* doctrine and stating that the Court appears to follow the argument advanced in the U.S. brief in that case); Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946, 953-958 (1980); see also, *e.g.*, Petition for a Writ of Certiorari at 7-13, *Sivley* v. *Soler*, 113 S. Ct. 454 (1992) (No. 92-86) (petition seeking *Munsingwear* order where case creating circuit conflict became moot before government could seek review in this Court). But see 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10, at 432-435 (2d ed. 1984 & Supp. 1994) (disapproving *Velsicol* doctrine and stating that vacatur under *Munsingwear* is always appropriate when case becomes moot before Court grants certiorari); Arthur F. Greenbaum, *Mootness on Appeal in Federal Courts: A Reexamination of the Consequences of Appellate Disposition*, 17 U.C. Davis L. Rev. 7, 43-48 (1983) (same).

At least one court of appeals has relied on the discretionary nature of review by certiorari as one of a number of considerations that would support a court of appeals' decision not to vacate its own judgment if the parties settle after entry of judgment by the court of appeals. *Manufacturers Hanover Trust Co.*, 11 F.3d at 384-385 (2d Cir. 1993); see also *Oklahoma Radio Associates*, 3 F.3d at 1444-1445 (10th Cir. 1993) (applying multi-factored test and declining to vacate its own judgment in case in which parties settled after entry of judgment by court of appeals, but while petition for rehearing was pending). Whatever the merits of those rulings, we believe that vacatur is appropriate in cases in which the parties settle after the court of appeals decides to review a case en banc. See *Key Enterprises, Inc.* v. *Venice Hospital*, 9 F.3d 893, 896-900 (11th Cir. 1993) (en banc), petition for cert. pending, No. 93-1365; *Marc Development, Inc.* v. *FDIC*, 12 F.3d 948 (10th Cir. 1993) (en banc). That situation closely resembles a case in which this Court already has granted certiorari, thus transforming the possibility of discretionary review into an active process of ongoing review. Hence, under the analysis in this brief, vacatur is appropriate.

A. This Court's Precedents Mandate A General Rule Of Vacatur When A Case That Is Pending On Appeal Or Certiorari Becomes Moot As A Result Of Settlement

In *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court stated that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. In keeping with that established practice, the Court repeatedly has emphasized that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam) (quoting *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam)) (emphasis supplied by *Nelson* Court).

Since *Munsingwear* was decided in 1950, and for some years earlier, this Court appears to have followed the *Munsingwear* procedure consistently in cases that became moot as a result of settlement while pending before the Court. *E.g.*, *Continental Casualty Co.* v. *Fibreboard Corp.*, 113 S. Ct. 399 (1992);[7] *City Gas Co.* v. *Consolidated Gas Co.*, 499 U.S. 915 (1991);[8] *Lake Coal Co.* v. *Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam); *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U.S. 115 (1959) (per curiam);[9] *Black* v. *Amen*, 355 U.S.

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[7] See Motion to Grant, Vacate and Remand on Grounds of Mootness at 1-2, No. 91-1993 (O.T. 1992).

[8] See Joint Motion To Grant Certiorari, Vacate Judgment of Court of Appeals, and Remand with Directions To Vacate Judgment of District Court on Grounds of Mootness, No. 90-953.

[9] The petitioner in that case suggested to the Court that the case was moot, without requesting any particular disposition. See Memorandum of Petitioner, No. 450 (O.T. 1959). Counsel for the respondent informed the Clerk of the Court in a November 3, 1959, telegram that it would not oppose petitioner's suggestion of mootness and "respectfully suggest[ed] that [the] Court must dismiss [the] petition as [a] matter of routine." The memorandum and telegram are in the case file in the National Archives.

600 (1958) (per curiam); *Stewart* v. *Southern Railway*, 315 U.S. 784 (1942) (per curiam);[10] *Hammond Clock Co.* v. *Schiff*, 293 U.S. 529, 530 (1934) (per curiam).[11] Although most of those cases involved joint requests for vacatur, some, like this one, involved situations in which the prevailing party in the lower court did not agree to vacatur, although a settlement had rendered the case unreviewable. See *Continental Casualty Co.*, *supra* (despite opposition by respondent indemnitee, Court remanded for mootness determination requested by petitioner indemnitor after petitioner settled the underlying dispute pending in a lower court); *Lake Coal Co.*, 474 U.S. at 120 (parties asked Court to decide questions presented in petition "despite complete settlement of the underlying causes of action"). Whenever the dispute becomes unreviewable because of settlement, the decision of the party that prevailed in the lower court to forgo reliance on the judgment as a proper resolution of the underlying dispute justifies vacatur of that judgment, because it has become

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[10] See Motion by Petitioner and Respondent To Dispose of This Cause as Moot, No. 161 (O.T. 1941).

[11] Commentators have noted the consistency of the Court's recent practice with respect to settled cases. See, *e.g.*, Greenbaum, *supra* note 6, 17 U.C. Davis L. Rev. at 39 & n.144; Note, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. Ill. L. Rev. 731, 749. For older decisions taking a different approach, see *Buck's Stove & Range Co.* v. *American Federation of Labor*, 219 U.S. 581 (1911) (per curiam) (dismissing appeal in response to settlement); *Dakota County* v. *Glidden*, 113 U.S. 222 (1885) (dismissing writ of error after settlement).

unreviewable as a result of the action of that party in entering into the settlement agreement.[12]

Munsingwear itself, of course, did not involve mootness resulting from settlement. In *Munsingwear*, the government previously had brought suit to enjoin violations of certain price control regulations. The district court entered judgment against the government. While the government's appeal was pending, the commodity at issue was decontrolled. The defendant then moved to dismiss the government's appeal as moot, and the court of appeals granted that motion. 340 U.S. at 37. In rejecting the government's subsequent attempt to avoid the res judicata effects of the district court's prior judgment, the Court observed that the government, through "orderly procedure," could have "prevent[ed] [the] judgment, unreviewable because of mootness, from spawning any legal

[12] Vacatur is not required when the parties' settlement agreement merely contemplates dismissal of the writ of certiorari pursuant to this Court's Rule 46. In that circumstance the parties effectively have decided to be bound by the judgment below, and thus the case is no different from one in which the losing party simply decides not to seek review in this Court. See, *e.g.*, *Allen & Co.* v. *Pacific Dunlop Holdings, Inc.*, 114 S. Ct. 1146 (1994) (dismissing writ of certiorari pursuant to Rule 46). Rule 46, of course, does not apply here, because this is not a case in which "all parties * * * [have] agree[d] * * * that a case be dismissed," Rule 46.1.

For similar reasons, as we explain below (at pages 14-16, *infra*) in our discussion of *Karcher* v. *May*, 484 U.S. 72, 82-83 (1987), vacatur is not appropriate when the losing party simply declines to appeal or unilaterally withdraws its appeal. In such instances, the case may be over, but it is not "moot." To the contrary, the losing party has decided to accept the judgment as defining its legal obligations with respect to the subject matter of the lawsuit. By contrast, when the parties jointly adopt a resolution of their dispute that differs from the resolution reached by the existing judgment (and that resolution is implemented by the trial court if necessary, as in this case), the losing party has persuaded the prevailing party to forgo relying on the existing judgment as a proper resolution of their underlying dispute. Accordingly, the principle of *Munsingwear* calls for vacatur of that judgment.

consequences" merely by asking that the district court's judgment be vacated as moot, rather than acquiescing in the dismissal of its appeal. *Id.* at 41. The Court explained:

> That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Id. at 40.

Because *Munsingwear* itself involved mootness by what the Court labeled "happenstance," 340 U.S. at 40, some courts of appeals have concluded that *Munsingwear* should be limited to that context, refusing to apply it in cases in which mootness results from the actions of the parties themselves.[13] Nothing in the rationale of *Munsingwear*, however, supports limiting vacatur to cases in which mootness occurs by "happenstance." The Court used that term only as a description of the way in which the judgment in *Munsingwear* itself became unreviewable. The rule of vacatur the Court announced for cases that have become moot was stated in categorical terms. 340 U.S. at 39. In a case such as *Munsingwear*, the fact that the case was rendered moot by "happenstance"—*i.e.*, by factors extrinsic to the case or beyond the control of the parties—explains why the lower-court judgment should be vacated on the motion of just *one* of the parties (the losing party below, which has been prevented from obtaining appellate review), even if the prevailing party does not join in seeking (or indeed opposes) vacatur. A case rendered moot by settlement is another such situation. The

[13] See, *e.g.*, *In re United States*, 927 F.2d at 627-628; *National Union Fire Insurance Co.*, 891 F.2d at 766; *In re Memorial Hospital*, 862 F.2d at 1301; *Ringsby Truck Lines*, 686 F.2d at 721.

agreement of the prevailing party below is necessary for the settlement to be effective. Vacatur accordingly is a suitable and natural consequence of the decision by the prevailing party both to join in the action that has rendered the case moot and to forgo the benefits of the judgment below, even if, as here, the prevailing party opposes vacatur.

In seeking to confine *Munsingwear* to instances of mootness by "happenstance," respondent relies (Resp. Reply 1-2) on *Karcher* v. *May*, 484 U.S. 72, 82-83 (1987). In that case, former state legislative officials, purporting to act on behalf of the legislature, attempted to take an appeal to this Court from a lower court's judgment invalidating a state statute. While the case was pending in this Court, the appellants' successors in office withdrew the appeal. The Court rejected the appellants' request to vacate the judgment below under *Munsingwear*, explaining (484 U.S. at 83):

> This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case.

Contrary to petitioner's contention, *Karcher* does not render *Munsingwear* inapplicable when mootness results from the mutual agreement of the parties. Withdrawal of the appeal in *Karcher* did not render the dispute moot, any more than any losing party's decision to forgo further review of a judgment has that effect; rather, the case simply ended when the judgment of the lower court was rendered final and unreviewable by withdrawal of the only appeal any party had filed from that judgment. See *Long Island Lighting Co.* v. *Cuomo*, 888 F.2d 230, 233, 234 n.4 (2d Cir. 1989). In this case, by contrast, petitioner, which lost in the lower court, has not withdrawn its petition for a writ of certiorari, and it continues to seek to have the judgment of the court of appeals set aside.

Our understanding of *Karcher* is confirmed by a series of decisions, both before and after *Karcher*, in which this Court has applied *Munsingwear* to cases that became moot based on the conduct of the parties. Those cases have included not only the situation discussed above—in which the parties agreed to a settlement—but also a number of cases in which the party that prevailed in the lower court rendered the case moot by receding from its position. For example, in *Deakins*, 484 U.S. at 199-200, the respondents (plaintiffs in the district court) chose to withdraw their claims while the case was pending before this Court. Applying *Munsingwear*, the Court vacated the judgment below and remanded with directions to dismiss. 484 U.S. at 200-201. Similarly, in *Frank* v. *Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989) (per curiam), in light of a concession by the appellant government officials, the plaintiff—appellee in this Court—"state[d] its willingness to forgo any further claim to the * * * relief sought in its complaint." *Id.* at 227. Concluding that the case was moot, the Court vacated the judgment below and remanded with directions to dismiss. *Ibid.* (citing *Munsingwear*). See also *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 512-513 (1989) (*Munsingwear* treatment in response to withdrawal by plaintiffs/appellees of request for relief in light of appellant's legal position); *Gray* v. *Board of Trustees*, 342 U.S. 517, 518 (1952) (per curiam) (similar treatment where action of appellee mooted controversy); *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360, 362 (1919) (same); see also *Board of Governors of Federal Reserve System* v. *Security Bancorp*, 454 U.S. 1118 (1981) (*Munsingwear* treatment where respondent's actions mooted application for permission to acquire bank) (see 81-176 Pet. at 10-12); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) (per curiam) (vacating judgment

of state supreme court after case was rendered moot by action of respondent).[14]

In sum, this Court's decisions do not support respondent's contention that *Munsingwear* is inapplicable when mootness is caused by a mutual agreement of the parties. Rather, those decisions strongly support the conclusion that a court of appeals' judgment should be vacated if the case is rendered moot by settlement after this Court grants a petition for a writ of certiorari, but before it decides the case.[15]

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[14] In the cases cited in the text, a case before the Court became moot because of unilateral action by the party that prevailed in the lower court. On occasion, however, the Court appears to have followed a similar approach when a case became moot because of unilateral action by the party that lost below. See, *e.g.*, *Weinstein* v. *Bradford*, 423 U.S. 147, 148-149 (1975) (per curiam); *Preiser* v. *Newkirk*, 422 U.S. 395, 399, 402-404 (1975); *Board of Regents* v. *New Left Education Project*, 414 U.S. 807 (1973). The propriety of vacatur in those cases is not clear. Compare 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10, at 430-431 (2d ed. 1984) (discussing *Board of Regents* and arguing that *Munsingwear* treatment is appropriate in such cases), with, *e.g.*, *Arthur* v. *Manch*, 12 F.3d 377, 381 (2d Cir. 1993) ("[T]he appellate court should not vacate the judgment below if the case has become moot due to the voluntary act of the losing party.") (quoting *Manufacturers Hanover Trust Co.*, 11 F.3d at 383).

In our view, the losing party below should not be able to obtain vacatur of an unfavorable judgment through unilateral action, at least in the absence of unusual circumstances, such as when the losing party complies involuntarily with a preliminary injunction, *Honig* v. *Students of California School for the Blind*, 471 U.S. 148, 148-149 (1985) (per curiam), or when a legislative enactment resolves the immediate controversy, *Bowen* v. *Kizer*, 485 U.S. 386, 387 (1988) (per curiam). Where such unusual circumstances are not present, the losing party's unilateral action functionally resembles a failure to appeal or a decision to withdraw an appeal. Such a determination to forgo a challenge to the judgment justifies leaving it in place as a binding determination of the rights of the parties. Because this case became moot through a mutual agreement of settlement, that problem is not present here.

[15] This case, of course, involves only the propriety of vacating judicial judgments when appeals of those judgments are rendered moot by

B. Considerations Of Fairness And Public Policy Support A General Rule Of Vacatur In Cases That Become Moot As A Result Of Settlement While Pending On Appeal Or Certiorari

Respondent contends (Resp. Reply 2) that considerations of judicial economy counsel against vacatur when a pending case is rendered moot by voluntary settlement. In our view, however, the established practice of vacatur in that context strikes the proper balance between the interests in judicial economy and the strong considerations of policy and fairness that support the Court's consistent approach in this area.

1. *A rule of vacatur furthers the judicial system's important interest in voluntary settlement of disputes*

Our legal system strongly favors voluntary resolution of disputes, which serves not only the private interests of the

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settlement. Vacating an administrative decision presents considerably different considerations. Thus, although the Court has applied *Munsingwear* to an agency adjudication that became moot through the withdrawal of a request for administrative action while judicial review was pending, see *A.L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 329 (1961), we believe that a different result is called for when the private parties affected by an agency ruling settle their differences and seek to have the agency's ruling vacated without the consent of the agency. In that setting, the agency itself is generally a party to the litigation as well, and its absence from the settlement agreement therefore ordinarily would prevent the case from being moot. The agency has an independent regulatory interest in its order, both with respect to the immediate parties and with respect to third parties who are not before the court but might be guided by the reasoning in the agency's order. Moreover, agencies are not constrained by the case-or-controversy requirement of Article III, so the mootness concerns underlying the *Munsingwear* doctrine have less force in that context. See generally *Radiofone, Inc.* v. *FCC*, 759 F.2d 936, 940-941 (D.C. Cir. 1985) (opinion of Scalia, J.); Greenbaum, *supra* note 6, 17 U.C. Davis L. Rev. at 54-64.

parties themselves, but also important public interests. *Marek* v. *Chesny*, 473 U.S. 1, 10 (1985); *Williams* v. *First National Bank*, 216 U.S. 582, 595 (1910); Note, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 Yale L.J. 860, 866 n.41 (1987) [hereinafter Note, *Avoiding Issue Preclusion*]; Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 Fordham L. Rev. 233, 236 & nn.18 & 21, 242 (1989) [hereinafter Note, *Settlement Pending Appeal*] (collecting authorities). First, settlement serves the interests of judicial economy and efficiency by eliminating the necessity for further judicial consideration of the merits of the settled case. See, *e.g.*, *Federal Data Corp.* v. *SMS Data Products Group, Inc.*, 819 F.2d 277, 280 (Fed. Cir. 1987) (to the extent that it prevents settlement, precluding vacatur "is wasteful of the resources of the judiciary"); Note, *Avoiding Issue Preclusion*, 96 Yale L. J. at 866-867. That interest has as much force when cases settle in this Court as it does when they settle in a trial court before judgment. Settlement eliminates the need for this Court to expend its scarce resources to resolve the questions raised by the case, as well as the need for the lower courts to conduct any further proceedings (including, in many cases, a trial) that could be necessary on remand.

Second, settlement promotes economic efficiency by capping litigation costs and permitting the parties to devote their resources and attention to more productive endeavors. See Note, *Avoiding Issue Preclusion*, 96 Yale L.J. at 867; Note, *Settlement Pending Appeal*, 58 Fordham L. Rev. at 239. In addition, settlement serves both public and private interests in the just resolution of disputes: "One of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement." Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203, 203 (1976); see *Chemetron Corp.* v.

Business Funds, Inc., 682 F.2d 1149, 1202 n.5 (5th Cir. 1982) (Reavley, J., dissenting), vacated and remanded, 460 U.S. 1007 (1983); Note, *Settlement Pending Appeal*, 58 Fordham L. Rev. at 236.

A general rule of vacatur upon settlement furthers those important interests by eliminating significant disincentives to settlement while a case is pending on appellate review (including review on writ of certiorari in this Court).[16] Often it would be difficult or impossible to achieve a settlement if the judgment of the lower court would not thereafter be vacated. In cases in which the losing party has a strong interest in avoiding the preclusive effect of the judgment below[17] or in eliminating its precedential force,[18] that party might be

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[16] See *Nestle Co.*, 756 F.2d at 282; *Long Island Lighting Co.*, 888 F.2d at 234 n.4; Note, *Settlement Pending Appeal*, 58 Fordham L. Rev. at 242-243; Greenbaum, *supra* note 6, 17 U.C. Davis L. Rev. at 36-37.

[17] We agree with the prevailing view that a judgment that has been vacated generally has no res judicata or collateral estoppel effect. See *Munsingwear*, 340 U.S. at 39-40; *Pontarelli Limousine, Inc.* v. *City of Chicago*, 929 F.2d 339, 340 (7th Cir. 1991); *Savidge* v. *Fincannon*, 836 F.2d 898, 906 & n.33 (5th Cir. 1988); *No East-West Highway Committee, Inc.* v. *Chandler*, 767 F.2d 21, 24 (1st Cir. 1985); *Dodrill* v. *Ludt*, 764 F.2d 442, 444 (6th Cir. 1985); *Quarles* v. *Sager*, 687 F.2d 344, 346 (11th Cir. 1982); 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4432, at 302 & n.18 (1981); 1B James Wm. Moore et al., *Moore's Federal Practice* ¶ 0.416[2], at III-314 (2d ed. 1993). But see *Bates* v. *Union Oil Co.*, 944 F.2d 647 (9th Cir. 1991), cert. denied, 112 S. Ct. 1761 (1992); *Chemetron Corp.*, 682 F.2d at 1187-1192.

[18] Most courts that have considered the question have concluded that vacatur also deprives the lower court's judgment of its precedential effect. See, *e.g.*, *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979); *Martinez* v. *Winner*, 800 F.2d 230, 231 (10th Cir. 1986); *DHL Corp.* v. *CAB*, 659 F.2d 941, 944 n.4 (9th Cir. 1981); *Marshall* v. *Whittaker Corp.*, 610 F.2d 1141, 1145 (3d Cir. 1979); Greenbaum, *supra* note 6, 17 U.C. Davis L. Rev. at 95 & n.399 (collecting authorities). But see *United States* v. *Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987). Of course, a decision that has been vacated still may have persuasive value

unwilling to forgo further appellate review if vacatur is unavailable (especially if the party believes it would prevail on such review). That concern is particularly strong in cases involving the government and other institutional litigants, which often are more interested in the precedential effect of a decision than in the details of the particular case. See Greenbaum, *supra* note 6, 17 U.C. Davis L. Rev. at 35 n.130. Thus, a general rule of vacatur when cases become moot through settlement encourages the voluntary resolution of disputes.[19]

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based on the force of its legal analysis. See *County of Los Angeles*, 440 U.S. at 646 n.10 (Powell, J., dissenting); Greenbaum, *supra* note 6, 17 U.C. Davis L. Rev. at 100 & n.417.

[19] At least one court has suggested that the practice of granting vacatur when cases settle on appeal will encourage parties to delay settlement until after trial, secure in the knowledge that vacatur will be available if the court enters an unfavorable judgment. *In re Memorial Hospital*, 862 F.2d at 1302; see Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 632-642 (1991) (economic model discussing impact on settlement decisions of possibility of vacatur). In our view, that concern is greatly overstated. The cases in which parties are most likely to view vacatur as potentially valuable are those "in which the legal or factual issues are sufficiently complex that it is difficult to predict the outcome of the litigation." *Id.* at 637 n.239. It is in precisely such cases, however, that "[a] pretrial settlement at a value that both parties view as reasonable may be impossible to achieve, given the substantial differences in the parties' expectations of the litigation outcome." *Ibid.*; see also Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. Chi. L. Rev. 337, 338-340 (1986) (summarizing literature suggesting that it is difficult to settle close cases); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1, 14-16 (1984) (economic model suggesting that it is difficult for parties to settle close cases).

Moreover, any concern about the effect that a rule of vacatur might have on pre-trial settlement would be overshadowed in most cases by the very real costs imposed on parties that choose to litigate unsuccessfully rather

By contrast, denying vacatur when parties settle cases that are pending on appeal undoubtedly would lead to additional litigation: Some parties, even if they could reach mutually agreeable settlement terms, would not be able to resolve their dispute voluntarily because of continuing concerns about the effects of the outstanding lower-court judgment. Indeed, as Judge Easterbrook has acknowledged, in a court that refuses to permit vacatur upon settlement, there is simply "no answer that will satisfy" a litigant that is unable to consummate an otherwise satisfactory settlement because of the unavailability of vacatur. See *In re Memorial Hospital, Inc.*, 862 F.2d 1299, 1303 (7th Cir. 1988).[20] In short, denying vacatur upon

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than settle before judgment is entered by the district court. Litigation is expensive, and unfavorable judgments often result in damaging publicity that cannot be eliminated by subsequent vacatur. Also, the entry of an unfavorable judgment tends to increase dramatically the price of settlement for the losing party, because it significantly lessens that party's chance of eventual success in the courts. In the great run of cases, those incentives to settle are likely to be much more significant than any consideration arising from the possibility that the party later might be able to secure vacatur of any adverse judgment in connection with a settlement of the dispute. See also Greenbaum, *supra* note 6, 17 U.C. Davis L. Rev. at 37 ("[I]n all probability few litigants would appeal solely to make [vacatur] a portion of the settlement agenda.").

[20] As one leading treatise observes, "[i]t is particularly daunting to contemplate that even after the parties have preferred to surrender the opportunity for appellate review as a matter of right in order to achieve the certainty and economy of settlement, they can do so only if they are willing to submit to nonmutual issue preclusion in litigation with nonparties." 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10, at 307 n.22 (Supp. 1994). In an attempt to respond to that concern, the Seventh Circuit has suggested that "[i]f parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision, an outcome our approach encourages." *In re Memorial Hospital*, 862 F.2d at 1302. As explained above (see note 19, *supra*), however, it frequently is impracticable for the parties to settle at such an early stage,

settlement would frustrate important interests in fairness and judicial economy.

2. *The public interest in the judicial system and its decisions does not override the interests favoring settlement that are furthered by a rule of vacatur*

Respondent argues that a rule favoring vacatur of a judgment that is rendered moot by a settlement "would constitute a waste of judicial resources and serve no benefit." Resp. Reply 2.[21] We disagree.

a. First, it is an exercise in speculation to ground a rule that predicates denial of vacatur on the possibility that the precedential value of the decision below will benefit the public in the future. On the one hand, the benefits of leaving the decision in place are dubious. Because the vacatur issue before the Court here arises only in a case in which the Court has already granted a petition for a writ of certiorari but has not yet decided the case on the merits, there ordinarily will be

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especially in complex litigation in which it may be difficult to evaluate the legal and factual issues at an early stage.

[21] Several of the courts that have rejected vacatur when a case becomes moot by settlement have relied on the same point. *Clarendon Ltd.*, 936 F.2d at 129; *In re United States*, 927 F.2d at 628; *In re Memorial Hospital*, 862 F.2d at 1302-1303. Although the Seventh Circuit in particular also has relied on the interest in preserving the preclusive effects of the judgment, *id.* at 1303, respondent does not rely heavily on that point, perhaps because of the limited likelihood that the judgment of the court of appeals in this case will have significant preclusive effect. In any event, for the reasons set forth at pages 19-25 of our amicus brief in *Kaisha* (No. 92-1123), we do not think that the possible preclusive effects of a judgment in future cases offer a sufficient basis to deny vacatur following settlement of a pending dispute. We have provided a copy of our *Kaisha* brief to counsel for the parties.

a significant possibility that the decision below is incorrect;[22] the public gains little or no benefit from a rule that gives such a decision continuing precedential force.[23] Furthermore, even if the decision below is correct, it will rarely be clear that its precedential value will be significant as a practical matter; it is notoriously difficult to evaluate the extent to which any particular judicial opinion will provide significant guidance in the resolution of future disputes even within the jurisdiction of the court that issued it. By contrast, for the reasons discussed above, the benefits of vacating a lower-court judgment following settlement are immediate and certain: Vacatur lessens the burden on the Court and promotes resolution of disputes in a manner more likely to be acceptable to both parties.

More fundamentally, a rule that elevates the possible effect of a lower-court opinion on hypothetical future cases over the interest that vacatur serves in promoting the voluntary resolution of a live dispute actually pending before the Court ignores the central role of an Article III court: resolving concrete cases and controversies between parties. "[T]he purpose for which civil courts have been established" is "the conclusive resolution of disputes within their jurisdictions," *Montana* v. *United States*, 440 U.S. 147, 153 (1979), and "[i]n all civil litigation, the judicial decree is not the end but the

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[22] See, *e.g.*, *The Supreme Court—Leading Cases*, 107 Harv. L. Rev. 144, 376 (1993) (Court affirmed only 36.8% of cases reviewed on certiorari during 1992 Term in which Court issued full opinions).

[23] For several reasons, the interests in stability that precedents usually further are not likely to be enhanced significantly by precedents as to which this Court has granted review. First, when those precedents are inconsistent with the decisions of other courts of appeals, they will exacerbate the problems associated with a lack of geographical uniformity. Second, even when there is not a conflict in the circuits, this Court's willingness to grant plenary review is likely to cast sufficient doubt on the correctness of the decision to encourage litigation challenging the precedent.

means," *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987). Thus, "litigation exists to resolve the parties' genuine grievances; opinions are byproducts." *Bethune Plaza, Inc.* v. *Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988); see *Alliance To End Repression* v. *City of Chicago*, 820 F.2d 873, 876 (7th Cir. 1987); cf. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.' ") (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)). As Judge Winter has explained, it is inappropriate to rely on "the plight of hypothetical future defendants facing hypothetical future lawsuits" to justify "forc[ing] [the appellees in an existing case] to bear the costs and risks of further litigation." *Nestle Co.*, 756 F.2d at 284. In sum, it is not appropriate to give controlling weight to the abstract and secondary public interest in the opinions of the lower federal courts.[24]

b. Nor should the rule be limited to cases in which both parties seek vacatur of the lower court's decision pursuant to the settlement agreement. To be sure, it is especially perverse for a court to rely on the interests of persons who are not presently involved in the dispute within the court's jurisdiction as a basis for refusing to accept the terms of a settlement (including vacatur) agreed to by all the parties before the court. 13A Charles Alan Wright et al., *Federal*

[24] Vacatur upon settlement may be inappropriate when the judicial system itself has a distinct and legitimate interest in preserving the judgment below, as when the judgment involves contempt of court or otherwise implicates the authority of the courts, rather than the more generalized public interest in the precedential or preclusive value of judicial decisions in cases involving other parties. See *In re Memorial Hospital*, 862 F.2d at 1302-1303. In the contempt situation, for example, the court may be in a position analogous to that of a party to a case that has not joined in a settlement entered into by the other parties. Cf. note 15, *supra* (arguing that considerations favoring vacatur are diminished when private parties attempt to resolve a dispute regarding the decision of an administrative agency).

Practice and Procedure § 3533.10, at 307 n.22 (Supp. 1994). But the interests favoring settlement that support the rule of vacatur suggest that the same result should follow even if the party that prevailed in the lower court does not agree to vacatur.

The situation will arise most pointedly in a case in which the parties can agree upon a settlement of their underlying dispute, so that no live dispute would remain for decision, but the party that lost in the lower court is unwilling to agree to the settlement if it leaves the judgment of the lower court in effect. Absent a rule of vacatur, the parties would not settle and the court would be called upon to expend its resources to resolve the dispute. The sole interest furthered by the failure of the settlement in that scenario is the posited interest of persons not before the court in the precedential or preclusive effects of the judgment.[25] But that interest is of relatively attenuated significance to an Article III court, whose jurisdiction is limited to "Cases" and "Controversies." Where the parties can terminate the dispute that justified the exercise of Article III jurisdiction, the system disserves the parties if it protracts the case by leaving in place the judgment that the parties have decided to abandon as the basis for resolving their

[25] If the settlement would have rendered the case truly moot, in the sense that it would have removed any likelihood that the dispute would recur between the parties, the party that prevailed in the lower court would not have any direct interest in the continuing force of the judgment. If a cognizable likelihood of a recurring dispute remains—and if it is likely to evade review—then of course the case would not be moot and vacatur therefore would be inappropriate. See 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10, at 431 (2d ed. 1984) ("Any justified fear that the appellee may still need the protection of a judgment can be met by finding the case is not moot; that is the purpose of the elaborate rules governing voluntary discontinuance.").

dispute.[26] Accordingly, mootness occasioned by settlement justifies vacatur even if both of the parties do not seek that disposition.

II. IF THE COURT ADOPTS A RULE CALLING FOR CASE-BY-CASE CONSIDERATION, VACATUR IS APPROPRIATE IN THIS CASE

At least one court of appeals has adopted a rule under which the court considers on an ad hoc basis whether vacatur is appropriate, based on a balancing of "the competing values of finality of judgment and right to relitigation of unreviewed disputes." *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982). If the Court adopts such an ad hoc approach, we believe that two circumstances indicate that vacatur would be appropriate in this case.[27]

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[26] Logically, it is possible that a rule of vacatur would hinder settlement in cases in which the party that prevailed below is unwilling to accept a settlement that brings about vacatur of the judgment. As a general rule, however, vacatur is less likely to be of great concern to the party that prevailed than a denial of vacatur will be to the party that lost, because vacatur simply returns the parties to the status quo ante—with no judgment and no judicial opinion on the legal questions—while a denial of vacatur leaves one party burdened with a legal decision the precedential (and preclusive) import of which may be quite significant.

[27] Our amicus brief in *Kaisha* suggested (at 27-28) that if the Court rejected the general rule of vacatur we urged, the Court should adopt a rule under which a court presented with a joint request for vacatur would consider the request in a manner similar to the way in which courts review proposed consent decrees. That approach would not be directly helpful to the Court's resolution of the vacatur issue in this case, because the parties have not submitted to the Court a joint request for action. We note, however, that the parties did submit their consensual plan for reorganization to the bankruptcy court, which approved the plan. Vacatur is especially appropriate in light of that disposition of the underlying dispute.

A. This is not a case in which "litigants who [we]re dissatisfied with the decision of the [lower] court [attempted] to have [it] wiped from the books by merely filing an appeal, then complying with the order or judgment below and petitioning for a vacatur," *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991) (internal quotation marks omitted). When parties settle after this Court has granted a petition for a writ of certiorari, there can be little doubt that the petitioner's challenge to the judgment of the lower court was a substantial one that raised important questions of federal law. It is unlikely that parties frequently will adopt—or succeed in pursuing—a tactic of attempting to cause this Court to grant certiorari, solely with a view to settling the case and thereby removing the adverse precedential effect of the decision of a court of appeals.

Moreover, the terms of the settlement at issue here make it clear that this is not a case in which the party that lost below has rendered the case moot by relinquishing its efforts to overturn the lower court's decision. Petitioner responsibly accepted an offer of settlement in which respondent retreated dramatically from the position upheld by the lower courts—an offer that as a practical matter afforded petitioner treatment similar to that which it would have obtained if it had prevailed in this Court. Under the terms of the plan initially approved by the lower courts, petitioner had a secured claim for $3,200,000, representing the fair market value of the collateral as determined by the bankruptcy court. Although the plan technically provided that the secured claim would be paid in full, the plan for repayment was not favorable: it provided for monthly payments of interest only, and then a balloon payment of the principal balance 32 months after implementation of the plan. J.A. 11. Furthermore, because the obligations of the reorganized debtor to make those payments were secured only by the preexisting collateral, any decrease in the value of the collateral during the 32-month period would have diminished considerably the likelihood of petitioner's

receiving full payment of its claim. If petitioner had prevailed in this Court, the courts could not have approved that plan. Petitioner then would have been entitled to insist on an order lifting the automatic bankruptcy stay, which would have allowed petitioner to foreclose on the collateral and receive its full value at that time.

In contrast, the Third Amended Plan of Reorganization implemented pursuant to the parties' settlement gives petitioner substantial assurances that its secured claim will be paid in full.[28] To induce petitioner's voluntary agreement to refrain from foreclosing at this time, respondent and its owners agreed to contribute substantial additional collateral, effectively ensuring that petitioner in fact will be paid in full even if the reorganization is unsuccessful. Specifically, Paragraph 5.3.1.1 of the plan grants petitioner an express personal guaranty for the entire amount of the secured claim from both H.F. Magnuson and Lloyd Andrews (two of the principals of respondent). Third Amended Plan of Reorganization at 11. That Paragraph also provides that petitioner is to receive a first lien on Lloyd Andrews's personal residence and a second lien on a parcel of land adjacent to the existing shopping center. *Id.* at 10-11. Finally, respondent's principals are obligated to provide still more collateral if appraisals performed by persons selected by petitioner do not provide "evidence to [petitioner's] satisfaction" that the total value of the collateral exceeds the outstanding balance of the secured claim by a significant amount. *Id.* at 12-13.[29]

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[28] The Third Amended Plan of Reorganization appears as Exhibit B to the Memorandum of Respondent Suggesting that the Case Is Moot.

[29] Specifically, the ratio of the outstanding secured claim to the total value of the collateral must be no greater than 65%. Third Amended Plan of Reorganization at 12.

Two other features of the Third Amended Plan also improved petitioner's position considerably. First, although the plan initially approved by the lower courts provided for petitioner to receive interest at a rate capped at

In sum, the significant concessions by respondent reflected in the settlement suggest that it is inappropriate to view this as a case in which a petitioner retreated from its opposition to the lower court's judgment and seeks vacatur from this Court, even though the petitioner was unable to persuade the respondent to retreat from its position. As a practical matter, it is more accurate to view this as a case in which the respondent was unwilling to defend the judgment of the court of appeals and therefore entered into a settlement that gives up the greater part of the benefits it would have received under that judgment. Those circumstances suggest that vacatur would be especially appropriate. Cf. pages 15-16, *supra* (discussing this Court's practice of vacating lower-court judgments when a case becomes moot because of unilateral action by the party that prevailed in the lower court).

B. The importance of resolving a conflict among appellate decisions also counsels in favor of vacating the unreviewable judgment below. It appears that the decision in this case is the only court of appeals ruling that has expressly affirmed the new-value exception to the absolute priority rule since this Court's decision in *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197 (1988).[30] Accordingly, an order vacating

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7% per annum (J.A. 11), the Third Amended Plan provides (at 9-10) for an interest rate of 8.75% per annum. Second, although the plan initially approved by the lower courts provided for monthly payments of interest only (J.A. 11), the Third Amended Plan provides (at 10) for monthly payments in an amount that would amortize the entire debt over a 25-year period. The amortizing payments increase the security of the lender by decreasing the outstanding balance of the loan over time, and by increasing the debtor's equity in the property, which increases the debtor's incentive to care for the property.

[30] See Pet. 13-16 (discussing the decisions of the lower courts). Neither of the court of appeals decisions on which respondent relies (Br. in Opp. 17-18) as supporting the new-value exception included a square holding that the exception survives this Court's decision in *Ahlers*. *In re Anderson*, 913

the decision of the court of appeals would remove the circuit conflict that called for immediate action by this Court and leave the questions open for further consideration by all of the courts of appeals, including the Ninth Circuit. If another court of appeals hereafter should decide this issue in a way that creates a circuit conflict, the Court can review the matter at that time. The benefits of further consideration by the lower courts, unconstrained by the unreviewable decision in this case, counsel in favor of vacating the judgment below.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded with directions to dismiss petitioner's motion for relief from the automatic stay.

Respectfully submitted.

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F.2d 530 (8th Cir. 1990), in fact affirmed a bankruptcy court order rejecting a debtor's reliance on the new-value exception; the court merely stated in dictum that "[t]he district court recognized the continuing validity of the 'new value' exception to the absolute priority rule." *Id.* at 532. *In re U.S. Truck Co.*, 800 F.2d 581 (6th Cir. 1986), predated *Ahlers* by more than a year.